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No._____

In The

Supreme Court Of The United States

October Term 1998

JOHANNA F. MCGAHREN, JOHANNA F. MCGAHREN in her capacity as Administratrix for the Estate of Francis J. McGahren,

Petitioners

vs.

FIRST CITIZENS BANK, FIRST CITIZENS MORTGAGE CO., RICHARD L. MILLER; JAMES E. CREEKMAN, JAMES GARY ROWE; WILLIAM F. WOLCOTT III, and RONALD K. PAYNE, Substitute Trustee, .

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal Court of Appeals in complete disregard of the limits of federal question jurisdiction previously established by the United States Supreme Court can affirm dismissal of a removed civil action that references federal statutes for which Congress has not provided a private cause of action?

PARTIES TO THE PROCEEDING

All parties in the caption were parties to the proceeding, with the exception of Defendant Ronald K. Payne who was dismissed from the appeal and the case by stipulation of the parties. The remaining Defendants jointly participated in the proceedings for purposes of the appeal and have been jointly represented during the appellate process.

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APPENDIX

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Memorandum and Order and Judgment of the United States District Court for the Western District of North Carolina Filed August 1, 1997. . . . . App. 3

Petitioners, Johanna F. McGahren and Johanna F. McGahren in her capacity as Administratrix for the Estate of Francis Joseph McGahren Jr., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Johanna F. McGahren; Johanna F. McGahren in her capacity as administratrix for the Estate of Francis J. McGahren v. First Citizens Bank, First Citizens Mortgage Company, et al* (COA No. 97-2269; CA-93-143-1), entered on October 21, 1998 is not published. The opinion of the United States District Court, Western District of North Carolina, in *Johanna F. McGahren; Johanna F. McGahren in her capacity as administratrix for the Estate of Francis J. McGahren v. First Citizens Bank, First Citizens Mortgage Co., et. al.* (COA No. 97-2269; CA-93-143-1; file no. 1:93CV143 (W.D.N.C.)), filed August 1, 1997, is not published. Both opinions may be found in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered October 21, 1998. The Court of Appeals denied a timely petition for rehearing on November 16, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall... be deprived of life, liberty, or property, without due process of law..."

28 U.S.C. §1331 (Federal Question) provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1441 (Actions removable generally) provides in pertinent part:

> (c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. §1447(Procedure after removal generally) provides in pertinent part:

> (c) A motion to remand the case on the basis of any defect other then lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of state court. The State court may thereupon proceed with such case.

STATEMENT OF THE CASE

The fundamental question in this case is whether a Court of Appeals in complete disregard of the limits of federal question jurisdiction previously established by this Court can affirm dismissal of a removed civil action that references federal statutes for which Congress has not provided a private cause of action. It arises out of the Court of Appeals' defiance, in the preceding appeal, of the limits of jurisdiction established by this Court in its 1986 opinion in *Merrell Dow Pharmaceuticals Inc. v.Thompson*, 478 U.S. 804 (1986) and upheld by the Court of Appeals' in its 1994 opinion in *Mulcahey v. Columbia Organic Chemicals, Inc.* 29 F.3d 148 (4th Cir. 1994), which applied *Merrell Dow* to the same jurisdictional question. In order to fully appreciate the significance of the issues presented in this case, it is essential to consider the underlying facts and procedural background.

A. Factual Background

In July 1993 Frank McGahren and his wife Johanna ("Plaintiffs") filed a complaint in North Carolina State Superior Court against First Citizens Bank, First Citizens Mortgage Company, and five of their agents ("Defendants" or "First Citizens") for state causes of action that had arisen out of Defendants' wrongful acts in commercial dealings with Plaintiffs in respect to a 1984 mortgage on a parcel of commercial partnership property ("Lot 3").

Plaintiffs were *pro se*, and filed causes of action that they believed and intended to be state law claims under North Carolina law which included, but were not limited to, unfair & deceptive trade practices, breach of contract, defamation of credit, destruction of a new business, abuse of process, fraud, negligence, permissive waste, interference with prospective economic advantage, and intentional infliction of emotional distress. They prayed for many types of damages, including punitive damages for intentional wrongs, treble damages for unfair and deceptive trade practices, compensatory, special

and consequential damages, reasonable attorneys fees and any other relief deemed proper.[1]

In the complaint, Plaintiffs referenced two federal statutes as elements of their state causes of action to establish legal duties under North Carolina tort law. Plaintiffs had specifically filed the claims in state court because no federal remedy existed under either 18 U.S.C. § 152 or 11 U.S.C. § 362.[2]

Less than a week after filing the action, Plaintiffs filed a motion for a preliminary injunction to enjoin the impending foreclosure of Lot 3, in which they stated many of the causes of action as affirmative defenses to foreclosure and equitable reasons to stay the foreclosure pending the civil action. In support of injunction, they argued that First Citizens should not be allowed to proceed with a foreclosure it had caused and obtained by its own wrongful acts, especially after causing Plaintiffs extensive loss by defaming their credit and destroying a new business.

Plaintiffs motion to enjoin foreclosure was scheduled for hearing in state Superior Court, but First Citizens prevented it from being heard, and foreclosed the next day.

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[1] The gist of Plaintiffs' complaint was that First Citizens' breach of contract, fraud, defamation of credit, unfair & deceptive trade practices, and other tortious conduct, caused the destruction of a new business, an auto auction requiring a $200,000.00 credit line, that had been McGahren's livelihood, dream for success and the means of supporting his family. While the bulk of Defendants' misconduct occurred outside of legal proceedings, a wrongful foreclosure was partially caused by Defendants' abuse of the legal process by misrepresenting and concealing material facts in the bankruptcy case of McGahren's former business partner C. Walter Weiss and his wife Paulette ("Weiss"). Moreover, Plaintiffs' alleged First Citizens permissively wasted Lot 3 while it was in their possession.

[2] 18 U.S.C. § 152 makes it a federal criminal offense to conceal property from a bankrupt estate, make false oaths in connection with bankruptcy proceedings, make a false proof of claim against the estate, receive property from the debtor after he has filed bankruptcy, engage in bribery or alter or conceal records from that estate. 11 U.S.C. § 362 (Automatic Stay) stays all actions against the property of a bankruptcy debtor's estate.

Just before the hearing, First Citizens told Plaintiffs and their son, who had recently become licensed as a North Carolina attorney, and had noticed appearance for the hearing, that the motion would not be heard because Defendants had removed the case to federal court.

First Citizens justified removal under 28 U.S.C. § 1441 on the basis of the two federal statutes Plaintiffs referenced in the complaint, claiming that they had filed separate and independent claims for relief that, if they were the only claims, would be within the district court's exclusive jurisdiction under to 28 U.S.C. §1331. Plaintiffs did not believe this statement to be true, since they had not found any federal remedy under either 18 U.S.C. §152 or 11 U.S.C. §362, prior to filing their complaint, that justified bringing their complaint under federal jurisdiction. They filed the complaint in state court because they knew there was no reason to file causes of action that did not exist in a federal court that could not give them relief, and that their only remedy was a civil action for damages in state court.[3]

Although Defendants had justified removal on the grounds that Plaintiffs had filed claims for relief that were within the district court's federal jurisdiction, they took the opposite position after removal, asserting that Congress had not created any private right of action under the statutes the Plaintiffs had referenced in the complaint. But rather than admitting that removal had been improper, since none of the

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[3] As a result, they filed North Carolina tort claims titled "misrepresentation," "fraudulent concealment" and "intentional misrepresentation," and added a slash mark and the phrase "fraud upon the court" to reference the alternate criminal violation. They also incorporated the facts by reference in each of the claims to show that they also, not just the bankruptcy court, had relied on misrepresentations First Citizens had made, before learning that the claims were false. Plaintiffs also stated a claim for negligence *per se*, since Defendants had breached a statutory duty under 18 U.S.C. §152 to be truthful, and included fraud as an element in their claims for unfair and deceptive trade practices and abuse of process. In addition, they stated a cause of action for violation of the Automatic Stay that was intended as a negligence claim, since they had not found a private remedy under 11 U.S.C. §362.

claims had given rise to federal jurisdiction, First Citizens continued to invoke federal jurisdiction, and moved the district court to dismiss the complaint under F.R.Civ.P.12 (b)(6) for failure to state a claim upon which relief could be granted.

Upon receiving the motion to dismiss, it became clear to Plaintiffs that First Citizens had taken two inconsistent positions to gain unfair advantages in state and federal court, first asserting that Plaintiffs had stated valid federal claims to justify removal, and, after removal, asserting that the same claims were invalid federal claims to justify dismissal.

Before Plaintiffs could answer the motion to dismiss, a magistrate judge ordered a federal injunction on the removed action without their knowledge, despite their several refusals to First Citizens' requests to consent to magistrate jurisdiction over the case, and even though the magistrate lacked jurisdiction to grant injunctive relief.

When Plaintiffs objected to the magistrate's order and injunction, the district court refrained from commenting on the magistrate's lack of jurisdiction in ordering the injunction, and did not determine whether the district court had subject matter jurisdiction over the removed action, but ruled that the action should be stayed since pending bankruptcy appeals filed by Frank McGahren might have some preclusive effect.

Over the next three and a half years, Plaintiffs pursued appeals as interested parties in the bankruptcy proceedings of Walter C. Weiss.[4] Such proceedings ultimately led to the Court of Appeals' opinion in *Weiss*, 111 F.3d 1159 (4th Cir.), *cert. denied*, 118 S.Ct.369 (1997), wherein the Court of Appeals found that Lot 3, the parcel of property underlying the instant litigation, was never property of Weiss' bankruptcy estate. *Id.* at 1166 ("Thus, the district court correctly

[4] After filing three appeals to the Fourth Circuit Court of Appeals in July 1995, Plaintiff Frank McGahren died unexpectedly of a heart attack. Plaintiff Johanna McGahren was subsequently substituted as administratrix for his probate estate in the pending appeals and stayed civil action.

concluded that Lot 3 itself never became property of the estate"). [5]

Following the *Weiss* decision, the district court judge noticed Plaintiffs' undersigned attorney that the federal injunction that had stayed their civil action for almost four years had been lifted, that First Citizens' motion to dismiss would be heard, and that the parties could file supplemental pleadings. Undersigned counsel responded with a motion to remand for lack of subject matter jurisdiction, and alternative motion to amend the complaint to delete any federal claims inadvertently pled, but the district court did not answer the issue of jurisdiction. Instead, the district court struck Plaintiffs' motions and simultaneously dismissed their lawsuit on the

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[5] Just as the district court had failed to vacate the bankruptcy court's 1993 orders of abandonment and relief from stay for lack of subject matter jurisdiction in July 1995 upon finding that Lot 3 was never property of estate, the Court of Appeals did not vacate the district court's and bankruptcy court's orders for lack of subject matter jurisdiction. In *Weiss*, the Court of Appeals did not even acknowledge that the 1993 bankruptcy proceedings involved Lot 3, but newly concluded that they involved abandonment and relief from automatic stay of the debtor Weiss' equitable interest in a right to distribution from the winding up of W & M partnership affairs, an issue that had never even been mentioned in bankruptcy court proceedings.

Furthermore, in *Weiss*, the Court of Appeals incorporated the findings and conclusions the bankruptcy and district courts had made in respect to Lot 3 in the absence of jurisdiction and many findings that both courts had made *sua sponte* without due process, decided facts and issues that were never before the lower courts and had never been litigated, added new *sua sponte* findings without due process that were not true, and did not address any of the conflicting caselaw and evidence Johanna McGahren presented on appeal that disputed the findings and the lower courts' jurisdiction to make them.

The Court of Appeals denied petition for rehearing, in which she asserted that the opinion attempted to justify the five years of errors and abuses of federal jurisdiction and process that had transpired in the lower courts after the fact, and shift the blame to her and her family, contrary to the lower courts' orders, the record of proceedings, Supreme court decisions and decisions of the same Court of Appeals and other Circuit Courts, and the ends of justice and fairness. She subsequently filed a petition for Writ of Certiorari to this Court, which was denied with all petitions submitted in the October 1997 term. *See In Re Weiss Petition For Writ of Certiorari filed August 18, 1997.*

basis of collateral estoppel and F.R.Civ.P.12(b)(6), without ever allowing them an opportunity to challenge the striking of their motions or First Citizens' motion to dismiss. The order did not contain any analysis that established the propriety of First Citizens' 1993 removal or the district court's jurisdiction over the case. App 3-4, 22 Plaintiffs then appealed to the Court of Appeals.

B. The Proceedings below

On appeal to the Fourth Circuit, Plaintiffs first argued that the district court struck their motions and dismissed their lawsuit in the absence of jurisdiction and in violation of their due process rights, contrary to prior opinions of this Court, the same Court of Appeals, other Appellate courts, and the principles of fairness and justice.

Plaintiffs asserted that the district court's striking of their attorney's motion to remand and alternative motion to amend without any warning was a violation of due process contrary to *Chambers v. NASCO,* 111 S.Ct. 2123 (1991). They contended that at a minimum, the district court should have noticed them that their motions could be stricken and given them an opportunity to refute any charges against them and/or simply inquired into its own jurisdiction.[6]

Most importantly, Plaintiffs vigorously argued that even though the district court had wrongly avoided addressing the question of jurisdiction, the Court of Appeals had an affirmative duty to inquire into jurisdiction even on appeal, and find that the district court lacked subject matter jurisdiction.

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[6] Plaintiffs asserted that it was unfair for the district court to strike their attorney's motions on the grounds that he was a Georgia attorney who did not represent them, after acknowledging his representation by noticing him of his opportunity to supplement pleadings, and sending him all notices in the case and in all other cases in which he had represented them as a North Carolina attorney, and as a member of the bar of the same district court, since 1993.

Plaintiffs asked the Court of Appeals to apply this Court's opinion in *Merrell Dow* to their complaint, as it had in *Mulcahey* and find that the district court lacked federal question jurisdiction over the action, even if they referenced federal statutes, since Congress had not created a private cause of action or federal remedy under the statutes whereby they could obtain relief in the federal court. Thus, in light of *Merrell Dow*, and the Court of Appeals' on-point decision in *Mulcahey*, Plaintiffs argued that the Court of Appeals should have simply remanded the action to state court since federal question jurisdiction did not exist.

Plaintiffs also argued that the district court had not only dismissed their complaint in the absence of jurisdiction, but had also dismissed it by numerous misapplications of the doctrine of collateral estoppel and Rule 12(b)(6) of the Federal Rules of Civil Procedure.[7]

Plaintiffs also contended that the district court's biased and untrue comment at the conclusion of the order that they had plagued the federal courts was the kind of damaging *sua sponte* finding that one federal court after another had made, automatically believed, affirmed and added onto *sua sponte* throughout the federal litigation in violation of due process that had caused the district court's eagerness to strike their pleadings and dismiss the lawsuit. **App 21-22.** Plaintiffs asserted that, had they been given notice and opportunity, they could have shown that, in actuality, they had been plagued by the federal courts, and had been brought into, and kept in, unwarranted bankruptcy litigation by First Citizens, the Weiss bankruptcy trustee, her attorney, the bankruptcy court and district court who had misled them to believe that Lot 3 was property of Weiss' bankruptcy estate.

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[7] Plaintiffs offered numerous examples of how the district court had also incorrectly dismissed their complaint on the basis of collateral estoppel and Rule 12(b)(6). Such arguments are irrelevant to the issue of the bounds of federal jurisdiction addressed in this petition, but may be found in the briefs submitted to the Court of Appeals.

Plaintiffs asked the Court of Appeals to refrain from such bias in reviewing the district court's order because it was not only prejudicial to them, but frightening in its ramifications to the general public because of the potential misuse of judicial power to obstruct justice and deny due process to persons seeking redress in the courts.

On appeal, Defendants conspicuously avoided addressing the impropriety of their removal and the lack of subject matter jurisdiction. In oral argument, Plaintiffs again asked the Court of Appeals to apply *Merrell Dow*, as it had in *Mulcahey*, and remand to state court for lack of jurisdiction so they could finally have their day in court before a jury.

In the resultant one-line unpublished opinion, the Court of Appeals affirmed the district court's dismissal of the removed action on the grounds that there was no reversible error, without any explanation.

In a subsequent petition for rehearing and suggestion for rehearing in banc, Plaintiffs argued that the opinion conflicted with this Court, its own Court and state and federal Appellate Courts on every important question underlying the opinion, and that the Court's failure to apply *Merrell Dow*, and find that federal jurisdiction did not exist, was a violation of their due process rights, and a great injustice to them. The petition was denied.

REASONS WHY WRIT SHOULD ISSUE

I. The Petition Should Be Granted Since The Opinion Below Defies and Exceeds The Limits of Federal Question Jurisdiction Previously Established By This Court in *Merrell Dow Pharmaceuticals Inc. v. Thompson* and Upheld By The Court of Appeals

In the preceding appeal Plaintiffs vigorously argued that the district court dismissed their complaint in the absence of federal question jurisdiction, contrary to this Court's prior opinion in *Merrell Dow Pharmaceuticals Inc. v.Thompson*, 478 U.S. 804,106 S.Ct. 3229, 92 L.Ed.2d 650 (1986), and the Court of Appeals' on-point opinion in *Mulcahey v. Columbia Organic Chemicals Co., Inc.*, 29 F.3d 148 (4th Cir.1994).

In *Merrell Dow*, this Court found that a complaint that alleged a violation of a federal statute as an element of a state cause of action, like Plaintiffs' complaint in the instant action, did not confer federal question jurisdiction under 28 U.S.C.§1331 when Congress had not created a private cause of action for the violation. *Merrell Dow*, 478 U.S. at 804.

> A violation of a federal state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States" within the meaning of 28 U.S.C. § 1331. Thus, here, determining the question of removal jurisdiction by reference to the "well-pleaded complaint," and assuming that there is no federal cause of action. . .the cases were improperly removed to the Federal District Court. The assumed congressional determination to preclude private remedies for violations. . .is tantamount to a congressional conclusion that a claimed violation of the statue as an element of a state cause of action

is insufficiently "substantial" to confer federal-question jurisdiction.

Id. at 804.

Following the holding of *Merrell Dow*, the Court of Appeals similarly found in *Mulcahey* that a plaintiff's reference to an environmental statute in their complaint that did not support a private remedy did not raise a "substantial" federal question to confer federal question jurisdiction:

> The Court in *Merrell Dow* Court found that the congressional determination not to provide a private cause of action under the federal statute constituted a "congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal question jurisdiction"

Mulcahey, 29 F.3d at 150 (citing *Merrell Dow*, 478 U.S. at 814).

> Because the Plaintiffs could not proceed under any of these environmental statutes, and because the remedy sought is unavailable here, a "private cause of action" under *Merrell Dow* does not, in truth, exist.

Id. at 152-53

Following its *de novo* review in *Mulcahey*, the Court of Appeals found that subject matter jurisdiction did not exist under the precedent of *Merrell Dow*, and that the Mulcaheys' complaint should be remanded to state court:

> In summary, we find that the Plaintiffs' reference to federal environmental statutes in their state common law negligence action cannot support federal subject matter jurisdiction in the instant case. Accordingly,

we reverse and remand with instructions that the action be remanded to state court.

Id. at 154.

On appeal, Plaintiffs asked the Court of Appeals to also apply *Merrell Dow* to their complaint, and find, as it had in *Mulcahey*, that their references to federal statutes 18 U.S.C.§152 and 11 U.S.C.§362 also did not confer federal question jurisdiction.[8] Unlike its *Mulcahey* decision, the Court of Appeals in the instant action failed to inquire into whether federal question jurisdiction existed in accordance with 28 U.S.C.§1447(c).[9] In a terse one-line unpublished opinion, the Court of Appeals affirmed the district court's dismissal on the grounds that "there was no reversible error," with no mention of *Merrell Dow* or *Mulcahey*, no explanation to substantiate the district court's jurisdiction over the action, and no *de novo* review in response to Plaintiffs' arguments that, under *Merrell Dow*, the case should be remanded to state court for lack of federal subject matter jurisdiction.[10] **App 1- 2**

Petitioners submit that they not only had a right to question the district court's lack of jurisdiction, but also that

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[8] The Court of Appeals had previously determined that no private cause of action exists under 18 U.S.C. §152, the federal criminal statute Plaintiffs referenced in their complaint in the instant action. *Clayton v. Raleigh Fed Sav.Bank*, 107 F.3d 865 (table), 1997 WL 82624 (4th Cir.1997).

[9] 28 U.S.C.§1447(c) provides in pertinent part:

> (c) A motion to remand the case on the basis of any defect other then lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

[10] Unlike the opinion in the instant action, *Mulcahey* is a published *de novo* review which elaborates on the application of *Merrell Dow* and this Court's decisions in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983)).

the Court of Appeals had an affirmative duty to inquire into jurisdiction, particularly since Plaintiffs had raised the issue on appeal and challenged federal jurisdiction under *Merrell Dow*. This Court has previously found that a Court of Appeals must raise an objection to subject matter jurisdiction on its own initiative where jurisdiction is unclear on the record. *Insurance Corp of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S.Ct. 2099, 2104-5 (1982):

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United State is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."

Id. at 2104 (citations omitted).

Petitioners ask this Court to consider the importance of this issue, since the opinion below not only defies *Merrell Dow*, but defies and exceeds the limits of federal question jurisdiction previously established in *Merrell Dow*, and upheld by the Court of Appeals in *Mulcahey*, by affirming the district

court's dismissal of an improperly removed action, despite the district court's lack of federal question jurisdiction.

II. The Petition Should Be Granted Because the Supreme Court Must Exercise Its Supervisory Power When a Court of Appeals Departs So Far From The Usual Judicial Process That It Affirms An Abuse of Jurisdiction That Denies And Violate Due Process Rights, Undermines Congressional Intent and Obstructs Justice

Under the Fifth Amendment, "no person shall. . . be deprived of life, liberty or property without due process of law." Petitioners submit that the opinion below tramples on that fundamental right by allowing a district court that lacks jurisdiction to dismiss their complaint in the absence of jurisdiction, rather than remanding it to the state court of proper jurisdiction.

It should be noted that in its *de novo* review in *Mulcahey*, the Court of Appeals also relied on several fundamental Supreme Court opinions to support its determination that federal subject matter jurisdiction did not exist under *Merrell Dow* in respect to the Mulcaheys' complaint:

> The burden of establishing federal jurisdiction is placed upon the party seeking removal. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed.1214 (1921). Because removal jurisdiction raises significant federalism concerns, we must strictly construe removal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed 1214 (1941).
>
> *Mulcahey*, 29 F.3d at 151.

Despite the importance of applying the same Supreme Court decisions it relied on in *Mulcahey*, the Court of Appeals

disregarded this Court's controlling precedent in the instant action, and affirmed the district court's dismissal without even requiring Defendants to meet the burden under *Wilson* of establishing federal jurisdiction and the propriety of removal. In brief and oral argument, Defendants made no attempt to meet this burden, and avoided the issue altogether.

The Court of Appeals affirmed federal jurisdiction to dismiss the removed action, even though removal jurisdiction was more than doubtful and remand was warranted, since both Defendants and the district court had, in effect, agreed that federal jurisdiction did not exist under *Merrell Dow* by acknowledging that Congress had not created private causes of action under the federal statutes Plaintiffs had referenced in their complaint. **App pp. 18, 21; see also p. 5 bottom-page 6 above.**

Neither the Court of Appeals nor Defendants attempted to refute Plaintiffs' arguments that federal subject matter jurisdiction clearly did not exist under *Merrell Dow*, just as in *Mulcahey*, and that it was inconsistent for the district court to take jurisdiction over the complaint, then dismiss it on the grounds that Plaintiffs had filed clams for which there was no federal remedy, because, under *Merrell Dow*, if no federal remedy existed, no federal jurisdiction existed that justified removal or dismissal of their complaint.

The Court of Appeals did not respond to Plaintiffs' statements that Defendants' tactic of converting their state law claims into fatal federal claims, that they never intended to plead themselves, in order to remove the case to federal court and get it dismissed under F.R.Civ.P.12 (b)(6), was an abuse that should not be condoned, because it would allow any Defendant an easy and unfair way to get cases against them dismissed.

Petitioners submit to this Court that Congress' intent in enacting 28 U.S.C.§1447(c) is clear from the statutory language. It was to protect and preserve the due process rights of Plaintiffs whose cases had been improperly removed

to a federal court, to make sure that such cases were safely returned to the state court of proper jurisdiction, and to charge Defendants for improper removal.

> ...If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of state court. The State court may thereupon proceed with such case.
>
> 28 U.S.C.§1447(c)

In enacting the statute, Congress certainly did not intend the abuse of jurisdiction, violation of due process, and injustice that has occurred in this case, whereby a federal court that lacks jurisdiction over an improperly removed action unfairly rewards the Defendants for an improper removal, and unfairly punishes the Plaintiffs whose case has been improperly removed, by dismissing the case.

This Court has clearly recognized that on its face, the language of 28 U.S.C.§1447(c) gives the district court "no discretion to dismiss rather than remand an action" over which it lacks subject matter jurisdiction. *International Primate Protection League v.Administrators of Tulane Educational Fund,* 111 S.Ct.1700, 1710, 114 L.Ed.2d 134, __ (1991):

> The statute declares that, where subject matter jurisdiction is lacking, the removed case "*shall* be remanded." 28 U.S.C.§1447(c).
>
> *Id.* (emphasis in original).

Plaintiffs intentionally filed the complaint in state court because it belonged in state court. Even though some of

Defendants tortious conduct had also violated the federal statutes referenced in their complaint, they had no intention of filing federal causes of action that did not exist in a federal court that could not give them the relief they sought, and should not have to pay for Defendants' improper removal with dismissal of their lawsuit.

Plaintiffs had prayed for many types of damages in their complaint, first and foremost punitive damages for Defendants' intentional wrongs, treble damages for unfair and deceptive trade practices, compensatory, consequential and special damages, attorneys' fees and any other relief deemed proper. Just as in *Mulcahey*, the Court of Appeals should have concluded that, under *Merrell Dow*, Plaintiffs' references to federal statutes in their complaint:

> did not support federal subject matter jurisdiction; compensatory damages remedy sought was not available under the statutes, and they were either procedurally or substantially barred from proceeding under the statutes.
>
> *Mulcahey*, 29 F.3d at 152-53.

Unlike *Merrell Dow*, *Mulcahey*, and in contradiction to the above-referenced Supreme Court precedent, the opinion below affirms dismissal of Plaintiffs' complaint in the absence of jurisdiction, rather than correctly concluding that removal had been improper. Rather than affirming the district court, the Court of Appeals should have charged Defendants under 28 U.S.C. §1447 for falsely asserting that the claims were within federal jurisdiction for purposes of removal, and then, after removal, asserting that the same claims were invalid federal clams for purposes of dismissal. **see page 5 bottom – page 6 above.**

The opinion below should not be allowed to stand because it obstructs and denies justice. It not only allows a federal court that lacks jurisdiction to deny Plaintiffs their right

to remand so they can redress their grievances in the state court of competent jurisdiction; it also allows Defendants who have harmed them to walk away completely unaccountable for the extensive harm and loss they have caused, and also rewarded for their improper removal, which is completely contrary to the ends of fairness and justice.

Petitioners ask this Court to grant this petition because this Supreme Court must step in when a Court of Appeals departs so far from the usual judicial process that it goes against everything the process was created for, and affirms an abuse of federal jurisdiction that defies the law of this Court and its own court, violates and denies due process rights to redress, undermines Congressional intent and obstructs justice.

III. The Petition Should Be Granted In The Public Interest Of Other United States Citizens Who Stand To Be Similarly Harmed By Federal Courts That Abuse Jurisdiction And Deny And Violate Fundamental Due Process Rights

Petitioners also ask that this petition be granted in the public interest of all persons who stand to be similarly harmed as the Plaintiffs have been in this case. What has happened here should not happen to anyone.

What makes this case particularly outrageous, and the need to review the order below even more imperative, is that the abuse of jurisdiction manifested in this case is only an extension of a larger pattern of jurisdictional abuse underlying this case, whereby, for the past seven years, Defendants have been permitted to use the federal courts to obtain any relief they desire from federal courts that lack jurisdiction to benefit themselves and harm the Plaintiffs.

To add to this outrage, after being extensively harmed by countless federal rulings and defamatory findings that Defendants obtained in the absence of jurisdiction, by fraud, and in violation of Plaintiffs' due process rights, it is the

Plaintiffs who have been blamed and sanctioned for such abuse, and the seven year nightmare of unwarranted and destructive federal litigation that First Citizens initiated in March 1992, along with the bankruptcy trustee and her attorney. *See In Re Weiss Petition For Writ of Certiorari filed August 18, 1997*

The judgment for which Plaintiffs seek review not only affirms dismissal of their lawsuit against Defendants, despite the district court's lack of federal jurisdiction under *Merrell Dow*, but outrageously exonerates Defendants from extensive losses they have caused to Plaintiffs since 1991, both inside and outside federal courts, largely on the basis of the same rulings and findings. **App 4-15; 21-22**

The federal courts have allowed and sustained this jurisdictional abuse by consistently affirming orders issued in the absence of jurisdiction, rather than vacating them for lack of jurisdiction. Each time this happens, it has caused Plaintiffs to have to pursue another appeal to the next court in an attempt to find justice, only to find that the next court again affirms the former rulings made in the absence of jurisdiction, as in the present case. Despite many requests by Plaintiffs, neither the bankruptcy court, the district court nor the Fourth Circuit has admitted to lack of jurisdiction either in its own court or the court below, have avoided the issue, or justified the abuse, and blamed Plaintiffs, and their son, for abusing the federal process, which has prejudiced them.

As Plaintiffs have noted on appeal after appeal, and in this petition, the orders are far from objective, and are replete with biased and untrue *sua sponte* findings that have been made, automatically believed, added onto and affirmed by one federal court after another in violation of due process. In the preceding appeal, Plaintiffs asked the Court of Appeals to refrain from such bias because it not only prejudiced them but was also frightening in its ramifications to the general public because of the potential misuse of judicial power to obstruct justice and deny due process to persons seeking redress in the courts, but the requests fell on deaf ears. Plaintiffs were

treated radically different than the Plaintiffs in *Mulcahey*, even though the issues were the virtually the same.

Petitioners submit to this Court that the reason there was no *de novo* review in the instant case is the same reason that Plaintiffs' arguments in the previous *Weiss* case were also unaddressed – because the Court of Appeals was well aware that the federal courts never had jurisdiction over any matters involving Plaintiffs, but was unwilling to admit it. In *Weiss*, the court went so far as to completely deny what had occurred at 1993 bankruptcy proceedings, contrary to the record and the lower court's orders. In the instant action, and as argued above, the Fourth Circuit affirmed the district court's dismissal, rather than simply admitting that the district court lacked subject matter jurisdiction over the removed action under *Merrell Dow*, and that Plaintiffs complaint had been improperly removed to federal court, and stayed under a federal injunction for four years.

As argued in the preceding appeal, the federal courts have blamed Plaintiffs' for plaguing the federal courts, but at the same time have kept them hostage in federal courts that they never wanted to be in and never would have been in, if the federal courts had inquired into jurisdiction in the first instance. As shown by the present case, even when Plaintiffs finally escaped from federal courts that lack jurisdiction over them, and attempted to redress their grievances and obtain relief in the state court of proper jurisdiction, Defendants dragged them back into the federal court by removing the case to obtain yet another damaging ruling in the absence of jurisdiction that dismisses Plaintiffs lawsuit against them.

The bottom line, however, is that but for Defendants initiation of an unwarranted federal process, Plaintiffs would not have lost the last seven years of their lives. The last thing Plaintiff Frank McGahren needed in the last three and a half years of his life, when he was trying to build his new business and dream for success, was for Defendants to waste and stress his life and entangle him in unwarranted bankruptcy litigation, and the last thing his widow and son needed in the

first three and a half years after his death was to waste their lives trying to undo that damage and obtain justice to no avail. Who pays back them and their family back for this waste of life, for the thousands of hours and dollars they have invested in the hope of finding justice, only to be denied justice on every turn by the very courts that should be giving it?

The last thing the federal courts should be doing is protecting First Citzens who has been accused of wrongdoing, while denying Plaintiffs' right to redress. Do not Plaintiffs also deserve their day in court like other citizens, and did not our forefathers intend citizens to have juries, not judges, decide their disputes? While the instant case involves a petition for a review of an order that dismisses Plaintiffs' lawsuit in the absence of jurisdiction, the underlying issues are greater and more far-reaching and have to do with the potential of federal courts to violate citizens' rights to be free and safe from destructive governmental control. These abuses of federal jurisdiction, and Defendants abuse of the federal process, should not have been condoned and affirmed.

Petitioners seek review also in the public interest because if this decision is allowed to stand, it will encourage and sustain an abuse whereby a federal court can issue or affirm any order, despite the lack of jurisdiction, and denial and violation of due process rights, without ever having to substantiate its jurisdiction or explain itself. At the very least, the Court of Appeals should at least be required to explain how it can substantiate federal jurisdiction in light of this Court's prior decisions.

CONCLUSION

This case presents a question of exceptional importance regarding abuse of federal jurisdiction and the fundamental right of litigants not to be deprived of life, liberty and property without due process. If the opinion of the Court of Appeals is allowed to stand, it will do many many things.

It will allow a district court to exceed the limits of federal question jurisdiction in defiance of the limits previously established by this Court and upheld by the Court of Appeals. It will violate and deny the Plaintiffs' fundamental right to due process and allow the Defendants who have harmed them to walk away completely unaccountable and rewarded, with the help and blessing of the federal courts. It will encourage Defendants to continue to abuse the federal process to harm others, since they have been allowed to get away with it.

It will undermine the congressional intent underlying the remand provisions that were intended to protect due process rights of litigants whose cases have been improperly removed to federal courts, and will pose a danger to every citizen who stands to be similarly harmed as Petitioners have been. It will make a mockery of the justice system and erode fundamental principles of fairness and justice for which the courts were created. Finally, it will encourage a Court of Appeals to use its power any way it desires and to make biased exceptions to law with certain persons, without ever having to explain itself. However, by granting this petition, this court can correct these errors, abuses and potential dangers.

Accordingly, petitioners respectfully request that writ of certiorari be granted.

Respectfully submitted on this 12th day of February, 1999.

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97- 2269

JOHANNA F. MCGAHREN; JOHANNA F. MCGAHREN, in her capacity as administratrix of the estate of Francis J. McGahren,

Plaintiffs - Appellants

and

FRANCIS J. MCGAHREN,

Plaintiff,

versus

FIRST CITIZENS BANK & TRUST COMPANY; FIRST CITIZENS MORTGAGE COMPANY; RICHARD L. MILLER; JAMES E, CREEKMAN; JAMES GARY ROWE; WILLIAM F. WOLCOT, III,

Defendants – Appellees,

and

RONALD K. PAYNE, substitute Trustee,

Defendant

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Lacy H. Thornburg, District Court Judge. (CA-93-143-1)

Argued: September 23, 1998 Decided: October 21, 1998

Before WIDENER and LUTTIG, Circuit Judges, and MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, Sitting by Designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Matthew Francis McGahren, BAUM & MCGAHREN, Norcross, Georgia for Appellants. Earl Thomison Holman, ADAMS, HENDON, CARSON, CROW & SAENGER, P.A., Asheville, North Carolina for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

We have considered the record in this case and the briefs and, after oral argument, are of the opinion there is no reversible error in this case.

The judgment of the district court is accordingly affirmed for the reasons sufficiently expressed in the opinion.

AFFIRMED

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:93CV143

JOHANNA F. MCGAHREN, in Her Capacity as Administratrix of the Estate of Francis J McGahren; and JOHANNA F. MCGAHREN, Plaintiffs,	)	
vs.	)	MEMORANDUM AND ORDER
FIRST CITIZENS BANK & TRUST COMPANY; FIRST MORTGAGE COMPANY; RICHARD L. MILLER; JAMES E. CREEKMAN; JAMES GARY ROWE; WILLIAM F. WOLCOTT III; and RONALD K. PAYNE, Substitute Trustee, Defendants.	)	

THIS MATTER is before the Court on the motions to dismiss of Defendants Ronald K. Payne, First Citizens Bank & Trust (First Citizens), First Citizens Mortgage Company (First Citizens Mortgage), Richard Miller and James Creekman. On June 20, 1997, this Court gave the parties an opportunity to supplement their pleadings. The Defendants did not file any supplementation. Plaintiffs filed a motion to remand the case to state court through an attorney practicing in Georgia who has

previously averred that he does not represent them. **Clarification of Representational Status of Counsel, filed August 30, 1993.** Because the Plaintiffs appeared *pro se* and because the attorney who filed the motion has not been admitted *pro hac vice,* that motion is stricken from the record.

The Court first considers whether this action may be dismissed on the grounds of collateral estoppel. "Collateral estoppel precludes litigation of an issue decided previously l judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding. " ***In re McNallen,*** **62 F.3d 619, 624 (4th Cir.1995);** ***Johnson v. Smith,*** **97 N.C.App. 450, 453, 388 S.E.2d 582, 584,** ***rev. denied,*** **326 N.C. 596, 393 S.E.2d 878 (1990).** Here, the preceding judgment is ***In re Weiss,*** **111 F.3d 1159 (4th Cir.1997).** The following statement of facts have been adjudged by the Fourth Circuit Court of Appeals in that case. [1]

In 1985, C. Walter Weiss and Francis J. McGahren (McGahren), dissolved their partnership. As part of that dissolution, property known as Lot 3, Ridgedale Subdivision, was to be deeded to McGahren. [2] Unbeknownst to either

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[1] "In discovering what issues were determined by the judgment in the prior action, the court in the second action is free to go beyond the judgment roll, and may examine the pleadings and the evidence in the prior action..." **1B** ***Moore's Federal Practice,*** **2d Ed., § 443 (4).**

[2] When the partnership purchased thee property, it borrowed the money from First Federal which was later acquired by First Citizens. After the partnership dissolution, the loan was reissued to McGahren personally, who had signed a promissory note guaranteeing payment.

partner, the deed transfer mistakenly omitted Lot 3 and title to the property remained in the partnership. McGahren continued to maintain and control the property, renting it as a duplex, retaining rental proceeds, and paying maintenance costs. In December 1989, the title problem was discovered when McGahren attempted to sell the property.[3]

Meanwhile, Weiss filed a Chapter 7 bankruptcy petition in July 1987. Because he thought the property had been deeded to McGahren in 1985, Weiss did not list the property as an asset of his bankrupt estate. McGahren contacted the bankruptcy trustee in late December1989, or early January 1990, advising her that the property did, in fact, belong to him and that but for a mistake, it would have been deeded to him in 1985. The trustee asked whether there was any equity in the property and McGahren told her he had a sale contract for $68,000 which exceeded the mortgage and other liens.

When Weiss learned of the error in the original deed, he executed a general warranty deed in February 1990, giving title to McGahren of the tract. The validity of that deed, however, was questionable, since Weiss was in bankruptcy at the time.

In January 1991, there was a fire at the property which necessitated extensive reconstruction and repair, during which time McGahren lost rental income. McGahren began to

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[3] The potential buyers offered $68,000 for the property. The sale later fell apart for reasons unrelated to the title problem. The purchase contract had been contingent on McGahren repairing a water seepage problem in the basement of the house. The problem was not cured and in mid-January 1990, one of the buyers lost her job and no longer qualified for the bank loan needed to purchase the property.

experience financial difficulties and fell behind in mortgage payments. In August 1991,he stopped making mortgage payments altogether.

In September 1991, the trustee wrote to McGahren's attorney offering to make a motion in Bankruptcy Court for an order of abandonment to assist in clearing the title. In October 1991, a representative of First Citizens wrote McGahren advising of three methods to clear title, including abandonment of the property by the trustee.

In March 1992, the trustee offered again to abandon the property. However, McGahren, having fallen behind in mortgage payments, now objected to abandonment. McGahren insisted that the bankrupt estate now owned the property and the trustee was under an obligation to sell it. McGahren's theory was that the trustee could sell the property through a private sale which would net a greater profit than foreclosure and, thus would reduce the deficit he owed to the bank. The Bankruptcy Court disagreed and ordered the property abandoned by the bankrupt estate. [4]

In July 1992, McGahren asked the Bankruptcy Court for a quitclaim deed from the trustee. The next day, the trustee tendered a non-warranty deed but McGahren then refused to accept it. In August 1992, a bank representative wrote McGahren again, advising that the bank was willing to help clear title if the mortgage were brought current. It was not until

the summer or fall of 1993 that the bank finally foreclosed the property.

McGahren appealed the Bankruptcy Court's order of abandonment and in February 1993, the District Court remanded the matter to the Bankruptcy Court for a ruling on the value of the property. At that hearing, the bank presented another appraisal and expert testimony that the property was worth $55,000. The Bankruptcy Court again ruled the property should be abandoned and it was scheduled for foreclosure and sale.

In April 1992, McGahren sued the bankruptcy trustee for negligence and intentional misconduct claiming that she should have discovered the bankrupt estate's interest in Lot 3 and should have consummated the 1989 sale of the property. The trustee's motion for summary judgment was granted. McGahren's appeal to the district court was dismissed.

In July 1993, the Bankruptcy Court imposed sanctions against McGahren pursuant to Bankruptcy Rule 9011 and the inherent powers of the court. The District Court affirmed the imposition of sanctions against McGahren, stating

> [I]n pleading after pleading filed in Civil Case Nos. 1:93cv59 and 60, [McGahren] asserted half-truths to delay the foreclosure of the property. "[McGahren] has attempted to seize on an innocent error in the transfer, the perpetuation of which has been maintained by him alone..." McGahren's litigation has been interposed for an improper purpose to delay and because he was

[4] The damage caused by the fire decreased the value of the property. The trustee's appraisal set its value at $55,000. Thus, there was no equity in the property.

unhappy with rulings... McGahren's posture in connection with the proceedings below is a clear example of bad faith conduct, conduct which continued in the litigation of this appeal. For example, he placed on the record one page from a transcript of the abandonment hearing conducted on July 22, 1992, to support his contention that the trustee had refused to quitclaim the property to him unless he executed a release and dropped the adversary proceeding...The pages of the transcript which follow show that...the next day, McGahren refused to accept a deed from the trustee, after having asked for it. McGahren argues that his application for insurance to State Farm Insurance Company in the amount $75,000, a figure chosen by McGahren, shows the value of the house...However, although State Farm briefly bound the property while it conducted an appraisal, it ultimately declined to insure the property for any value and denied McGahren's application...,This is a prime example of McGahren's use of half-truths to attempt to prove his case. After the [sic] First Citizens obtained an appraisal of the property in the amount of $55,000, McGahren vehemently undertook to obtain higher appraisals. His wife wrote their appraiser instructing him to consider not yet completed repairs and a purported modification of restrictions which she claimed would enhance the value of the property...When rulings did not go McGahren's way in court, he did not hesitate to attack those testifying fore the trustee. He filed complaints with the North Carolina Real Estate Commission against both appraisers used by the trustee and the bank...Moreover, he sued the attorney who represented the original buyers of the property and he trustee in state court. He also sued the bank, its officers and attorneys in state and federal court...McGahren repeatedly presented half-truths and interrupted witnesses whom he was questioning in order to cut off answers. At times he became so agitated that the court had to warn him of the presence of federal officers. **Memorandum and**

Order, *McGahren v. Heck, et al.*, Civil No. 1:93cv84, filed July 11, 1995, at 17-22 (Voorhees, C.J.)(internal citations omitted).

The Fourth Circuit affirmed the order of abandonment, the dismissal of the suit against the trustee, the imposition of sanctions against the Plaintiffs and the dismissal of an appeal for failure to timely designate the record. ***In re Weiss, supra.***

While the above actions were pending, Plaintiffs McGahren and his wife filed this suit in state court alleging fifteen causes of action arising out of the same facts but against different Defendants. The Defendants removed the case to federal court asserting federal question jurisdiction (28 U.S.C. § 1331) because many of the causes of action were based on allegations that the Defendants had perpetuated a fraud on the United States Bankruptcy Court. Plaintiffs did not object to the removal. Causes of action one through six allege conduct by First Citizens, its agents and representatives. Defendants Miller and Creekman at the time were the Vice President and Group Vice President of Legal Services, respectively, for First Citizens. The remaining causes of action allege conduct only by First Citizens in its corporate capacity. Although First Citizens Mortgage, James Gary Rowe, William Wolcott, III, and Ronald K. Payne are named as defendants in the caption of the complaint, the allegations of the separate causes of action contain no reference to them. The action is therefore dismissed as to these Defendants since no cause of action names them as a defendant. Fed.R.Civ.P. 8(a) ("A

pleading which sets forth a claim for relief...shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief...").

In order to determine whether collateral estoppel applies, each of the 15 claims is considered. In the first cause of action, Plaintiffs allege First Citizens "misrepresented the condition of default" in McGahren's mortgage payments. concealed the value of the property, unnecessarily pursued foreclosure, failed to collect the debt from the bankrupt estate, in appropriately applied insurance proceeds after the fire at the property, and acted in concert with others to obtain unjust enrichment. Plaintiffs admit in their complaint that no mortgage payments were made after August 1991, when they took the position that the property should be sold by the trustee. **In re Weiss, 111 F.3d at 1164.** The Circuit found that First Citizens' expert witness offered a valid opinion as to the value of the property and disregarded McGahren's witnesses. **Id., at 1168 ("In addition, McGahren's appraisers based their estimates on incomplete and incorrect information.").** In contrast to the contention that First Citizens unreasonably pursued foreclosure, the circuit found First Citizens' evidence at the abandonment hearing to be conclusive. **Id.** Moreover, the foreclosure proceeding did not conclude until after three years after it was initiated, during which time bank representatives attempted to assist McGahren in clearing title. **Id., at 1169.** Since the property never became property of the bankrupt estate, First Citizens could not pursue a claim against it. Since

McGahren stopped making mortgage payments, First Citizens cannot be deemed to have destroyed his credit or to have acted in concert with others for unjust enrichment. [5] The only issue not before the circuit in the prior matters is whether or not First Citizens wrongfully applied insurance proceeds recovered as a result of the fire. However, that issue was resolved in the state foreclosure proceeding. The accounting used in the foreclosure proceeding also disposed of the eleventh cause of action for breach of contract based on an incorrect application of the insurance proceeds to the mortgage balance. ***Everett v. Continental Bank, N.A.,*** **845 F.Supp. 335 (M.D.N.C.) (involving similar facts where the court held that because all of the conduct of the bank had previously been adjudged appropriate, the derivative claims for defamation and unfair trade practices were collaterally estopped),** ***aff'd without opinion,*** **35 F.3d 555(table), 1994 WL 501781 (4th Cir. 1994),** ***cert. denied,*** **514 U.S, 1018 (1995).**

In the next six causes of action, Plaintiffs allege First Citizens violated 18 U.S.C. sec. 152 [6] by making false statements and misrepresentations in connection with a

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[5] This also applies to the ninth cause of action for defamation of credit, if indeed such a cause of action exists. Since McGahren admitted that he stopped making mortgage payments, First Citizens can hardly be faulted for reporting to the credit bureau that he was actually in default.

[6] This statute makes it a federal criminal offense to conceal property from a bankrupt estate, make false oaths in connection with bankruptcy proceedings, make a false proof of claim against the estate, receive property from the debtor after he has filed bankruptcy, engage in bribery, or alter or conceal records from the estate.

bankruptcy proceeding, specifically as to the amount of its lien on the property, McGahren's default status, the value of the property, and the application of the insurance proceeds. Plaintiffs also claim that the bank failed to file a proof of claim, concealed he fact that McGahren had actually overpaid the mortgage, stole insurance funds which would have reduced the mortgage debt, fabricated accounting sheets, and misrepresented its entitlement in interest and attorneys fees. Finally, Plaintiffs claim First Citizens acted negligently in connection with the bankruptcy proceeding. Since Lot 3 never became property of the estate, there was no reason for First Citizens to file a proof of claim. ***In re Weiss,* 111 F.3d at 1168.** Moreover, the Circuit found the conduct of First Citizens, which owed no duty to Plaintiffs, in obtaining an abandonment of the property in order to pursue foreclosure be appropriate. Again, each of these issues was addressed and resolved by either the Fourth Circuit opinion or the foreclosure proceeding.

Plaintiffs allege that First Citizens engaged in abuse of process by the above misrepresentations and concealments, by using court process to obtain title to the property, by making legal threats and attempting to force the property on him through the abandonment proceeding, and then destroying his credit, and by claiming costs and legal fees to which they were not entitled. As the Circuit noted

> The undisputed facts in the record demonstrate that when he first learned of the title error, he adamantly insisted that he owned the property exclusively and that the bankrupt estate had no interest. He did not

> change his position until after the fire damaged the property. At that point, McGahren unrelentingly tried to have the property included in the bankrupt estate. As the bankruptcy court stated, "it would be absolutely impossible for the trustee, as it has been impossible for the Court or anybody else to satisfy Mr. McGahren."

Id., at 1169.

The same reasoning applies to the fourteenth cause of action alleging that First Citizens violated the automatic stay provisions of the Bankruptcy Act by initiating the foreclosure proceedings before the bankruptcy was terminated. Despite the fact that the property never became part of the estate, the bank obtained an order of abandonment, at great expense, prior to the actual foreclosure. ***Everett, supra.***

The tenth and thirteenth causes of action allege destruction of a new business and interference with a prospective economic advantage. Assuming arguendo that such causes of action exist, each is based on Plaintiffs' contentions that First Citizens defamed his credit. Since he admitted he stopped making mortgage payments, no such defamation occurred. Plaintiffs also claim that if a trustee had sold the property, they would have recouped a gain. First Citizens abandonment proceeding prevented that from occurring. The cited portions from the Circuit opinion dispel any notion that First Citizens acted inappropriately and in fact show that the 1989 sale fell apart due to problems unrelated to the title. ***Id.***

The twelfth cause of action alleges that First Citizens improperly managed the property causing it to decrease in value during the abandonment proceedings. The record before the Circuit shows the property had depreciated as the result of a fire, that McGahren had made "slipshod" repairs, and finally turned it over to the bank. ***In re Weiss,*** **111 F.3d at 1167.**

Finally, Plaintiffs claim First Citizens' conduct in seeking abandonment of the property was "outrageous" (sic) and an intentional infliction of emotional distress. However, the Circuit has found this conduct appropriate. ***Everett, supra.***

"Defensive collateral estoppel bars a claim where a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant. Collateral estoppel may be used defensively as a bar if the plaintiff had a full and fair opportunity to litigate the issues in the previous suit..." ***Facemire v. Duff,*** **991 F.2d 789 (table), 1993 WL 128022 *1 (4th Cir.1993)(citing *Parkland Hosiery Co.., inc. v. Shore,* 439 U.S. 322, 326 n.4 (1979)), *cert. denied,* 510 U.S. 817 (1993); *Blonder-Tongue Labs, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971); *Johnson v. Smith, supra; NationsBank of North Carolina, N.A, v. American Doubloon Corp.,* 481 s.e.2d 387, 392, *rev. denied,* ___ S.E.2d 387, 392, *rev. denied,* ___ (N.C. June 5, 1997).** Here, the issues all arise from the same factual scenario as previously addressed. The issues are the same, i.e., the Plaintiffs' allegations of unconscionable conduct in connection with the property, abandonment proceedings

thereof in the Bankruptcy Court, and the ultimate foreclosure and sale. Those allegations were actually litigated, were determined by a final judgment, and were necessary to the judgment. ***Combs v. Richardson,*** **838 F.2d 112, 115 (4th Cir. 1988);** ***Alt. V. John Umstead Hosp.,*** **125 N.C. App. 193, 197, 479 S.E.2d 800, 803,** ***rev. denied,*** **345 N.C. 639, 483 S.E.2d 702(1977).** Thus, Plaintiffs are collaterally estopped from bringing this action.

As an alternative ruling, the Court addresses the motion to dismiss.

> [A] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved to support his claims.

McNair v. Lend Lease Trucks, Inc., **95 F.3d 325, 328 (4th Cir. 1996) (citations omitted).** For purposes of the motion, the facts alleged in the complaint are accepted as true. **Id., at 327.**

As noted above, six of Plaintiffs' causes of action are based on their claim of a private right of action stemming from alleged violations by First Citizens of a federal criminal statute. Title 18, United States Code, Section 152 makes it illegal to file false proofs of claim in bankruptcy proceedings, to conceal property of the estate, or to misrepresent records in such proceedings. There is no provision in the statute for a civil remedy for violations thereof. " 'It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of

reading into it.' ". ***Flowers v. Tandy Corp.*, 773 F.2d 585, 589 (4th Cir.1985)(quoting *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11. 19 (1979))**. The Fourth Circuit has ruled there is no private right of action conferred by violations of 18 U.S.C. sec. 152. ***Clayton v. Raleigh Fed. Sav. Bank*, 107 F.3d 865 (table), 1997 WL 82624 (4th Cir. 1997)(mortgagors who filed bankruptcy to stall foreclosure had no private cause of action pursuant to 18 U.S.C. §152 against mortgage bank for conduct in bankruptcy proceedings)**. There being no such causes of action, the Defendants' motion to dismiss for failure to state a claim upon which relief may be granted must be granted.

As to the remaining causes of action, a brief synopsis of the facts as alleged in the complaint is warranted. Plaintiffs claim First Citizens improperly retained approximately $3,000 from the insurance proceeds paid after the fire damage to the home instead of turning the money over to them. However, the complaint also recounts that First Citizens advised it could not release the funds until Plaintiffs completed repairs to the property. The deed of trust is quoted and it contains a provision that First Citizens could use insurance funds to repair the property in the event the mortgagors failed to do so.

Plaintiffs also allege that in August 1991 they stopped making mortgage payments and turned the property over to the bankruptcy trustee. When the trustee initiated abandonment proceedings, First Citizens advised the Bankruptcy Court it desired abandonment so that foreclosure could proceed.

Plaintiffs allege that First Citizens failed to apply $22,000 of mortgage payments made prior to the bankruptcy proceedings to the balance due thereafter.

First Citizens told the Plaintiffs it would help obtain clear title but only if the mortgage payments were resumed. First Citizens also advised that if the Plaintiffs did not want title to the property, it would do what was necessary to obtain a release of the property from the Bankruptcy Court in order to foreclose.

In April 1992, nine months after Plaintiffs admit they stopped making mortgage payments, First Citizens reported to the Asheville Credit Bureau that Plaintiffs were $3000 in arrears on their payments. As a result, a line of credit was not granted in connection with a new business venture.

After receiving an order of abandonment, First Citizens failed to respond to communications from the Plaintiffs concerning the maintenance of the home and requests for a loan history. Plaintiffs did receive a loan history and an accounting of the application of the insurance proceeds in March and May 1993. The loan history did not contain the handwritten notes of bank employee which appeared on a different copy of the history.

Plaintiffs' claim for unfair and deceptive trade practices alleges that First Citizens misrepresented the default on the mortgage, the amount of debt, interest and attorneys' fees owed thereon and the value of the property to the Bankruptcy Court. They also claim First Citizens forced title to the property on them and made a false accounting in connection with the

foreclosure. Accepting for purposes of this motion that the above actions occurred, the Plaintiffs have failed to state a claim under North Carolina law. **N.C.Gen.Stat. § 75-1.1, et seq.; *Hardy v. Toler,* 288 N.C. 303, 218 S.E.2d 342 (1975)(it is a question of law for the court to decide whether the conduct constitutes an unfair trade practice).** Plaintiffs' complaint also contains allegations that they turned the property over to the bankruptcy trustee in August 1991, and thereafter made no additional mortgage payments. Thus, Plaintiffs admit the mortgage was in default and the claim that First Citizens forced the property on Plaintiffs fails. Moreover, the application of the insurance proceeds was in accordance with the terms of the deed of trust. Therefore, First Citizens committed no error. The trustee initiated abandonment proceedings and presented evidence of the value of the property. Plaintiffs' claim therefore fails.

The second through seventh causes of action allege a private claim based on violations of 18 U.S.C. sec.152 by First Citizens. As noted above, the statute does not provide a private cause of action and these claims must therefore be dismissed. ***Clayton, supra;* see also *Hawkins v. Webster,* 78 N.C. App. 589, 337 S.E.2d 682 (1985) (a civil action in tort does not arise from perjury or subornation thereof).**

The eighth cause of action alleges abuse of process by First Citizens in connection with the abandonment proceedings. In order to sustain such a claim, Plaintiffs must show that First Citizens began the proceedings or used them to obtain an

ulterior motive; and once the action had begun, First Citizens committed acts which were improper in the regular prosecution thereof. ***Stanback v. Stanback*, 297 N.C.181, 200, 254 S.E.2d 611, 624 (1979).** However, the trustee began the abandonment proceedings. At the time she initiated those proceedings, Plaintiffs admit that not only were they in default on the mortgage, but they wanted the trustee to take over the property. Moreover, Plaintiffs were advised by First Citizens that unless the mortgage was brought current, it would participate in the abandonment proceedings and pursue foreclosure. Plaintiffs have failed to allege that by participating in these proceedings, First Citizens had an ulterior motive. Thus, the claim fails to state a cause of action.

The ninth, tenth and eleventh causes of action all deal with First Citizens' report to the Asheville Credit Bureau that Plaintiffs were in default on the mortgage. Plaintiffs claim this amounted to a defamation of credit. However, in order for a defamatory statement to be actionable, it must be false. ***Hanton v. Gilbert*, 486 S.E.2d 432, 437 (1997).** Since Plaintiffs admit they stopped making mortgage payments nine months prior to the report, there is no cause of action.

The tenth cause of action alleges Plaintiffs lost a business opportunity due to the credit report because they could not obtain a line of credit. Since the report was not false, no cause of action arises. Likewise, no cause of action is stated for "interference with prospective economic advantage."[7]

[7] This claim is more properly characterized as an element of damages

Plaintiffs have not alleged a valid contractual relationship with a third party, known to First Citizens, which was intentionally disrupted without justification by the bank. ***King v. North Carolina Dep't of Transp.*, 121 N.C. App. 706, 468 S.E.2d 486, *rev. denied*, 343 N.C. 751, 473 S.E.2d 617 (1996).**

The eleventh cause of action claims First Citizens breached an unidentified contract with Plaintiffs by failing to apply the insurance funds to the mortgage or the repairs of the property. However, the complaint discloses that First Citizens had a right under the terms of the deed of trust to do exactly what it did. Therefore, this claim also fails.

The twelfth cause of action alleges "permissive waste" by First Citizens for failing to "properly secure the property, to collect rent, to repair damages or make repairs or to otherwise maintain the property" thus allowing the property to decrease in value. However, Plaintiffs allege they turned the property over to the trustee; thus, the property came under the auspices of the bankruptcy trustee, not First Citizens.

The fourteenth cause of action alleges First Citizens violated the automatic stay in the bankruptcy proceedings by initiating foreclosure prior to the termination thereof. Any such cause of action, however, would accrue to the trustee, not the Plaintiffs. Moreover, First Citizens participated in abandonment proceedings, received an order of abandon-ment, and then foreclosed on the property. Having done so with the approval of the Bankruptcy Court, so claim is stated.

Finally, the Plaintiffs allege First Citizens intentionally inflicted emotional distress through its conduct. In order to state such a claim, Plaintiffs must allege extreme and outrageous conduct intended to cause and which did cause severe emotional distress. ***Eubanks v. State Farm Fire & Casualty,* 485 S.E.2d 870 (1997).** Whether conduct meets the standard of extreme and outrageous is a question of law for the court. ***Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 473 S.E.2d 38 (1996).** In order for conduct to qualify, it must "exceed all bounds usually tolerated by decent society." *Eubanks, supra*. The conduct alleged here simply does not meet that standard and, thus, this claim fails as well.

In conclusion, a brief comment on the conduct of these litigants is warranted. The Plaintiffs, individually and through the assistance of their son, have plagued the federal court system for over six years. Five different actions have been prosecuted by these Plaintiffs against any and all persons or entities involved, no matter how remotely, with this situation. All of these suits stemmed from a mistake in a title transfer which occurred in 1985 with the Plaintiffs persistently abusing the judicial system to avenge that mistake against parties having nothing to do with it. Having failed in prior litigation against the bankruptcy trustee, the Bankruptcy Court Judge, attorneys representing the failed 1989 buyers, and realtors who dared to opine the value of the property,

Plaintiffs turned to the bank holding the mortgage on the property and attorneys representing it. The complaints states elements of damages as causes of action and creates claims out of thin air. The Plaintiffs are hereby placed on notice that future attempts to file an action in this Court based on this factual scenario will not be looked upon lightly.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion to Remand Case to State Court or in the Alternative Motion for Leave to Amend, filed July 17, 1997, is hereby **STRICKEN,** and First Citizens' motion for additional time to respond to this motion is **DENIED,** as moot.

A Judgment dismissing this action on the grounds of collateral estoppel, or in the alternative, granting the Defendants' motions to dismiss, is filed herewith.

THIS the 1st day of August, 1997.

LACY H. THORNBURG
UNITED STATES DISTRICT
COURT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:93CV143

JOHANNA F. MCGAHREN, in Her Capacity as Administratrix of the Estate of Francis J McGahren; and JOHANNA F. MCGAHREN, Plaintiffs,	)	
vs.	)	JUDGMENT
FIRST CITIZENS BANK & TRUST COMPANY; FIRST MORTGAGE COMPANY; RICHARD L. MILLER; JAMES E. CREEKMAN; JAMES GARY ROWE; WILLIAM F. WOLCOTT III; and RONALD K. PAYNE, Substitute Trustee, Defendants.	)	

For the reasons set forth in the Memorandum and Order filed herewith,

IT IS ORDERED, ADJUDGED, AND DECREED that the Defendants' motions to dismiss are ALLOWED, and this matter is hereby DISMISSED IN ITS ENTIRETY WITH PREJUDICE.

THIS the 1st day of August, 1997.

LACY H. THORNBURG
UNITED STATES DISTRICT
COURT JUDGE